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BEFORE THE  
SURFACE TRANSPORTATION BOARD

ENTERED  
Office of Proceedings

CANEXUS CHEMICALS CANADA, L.P.

Complainant,

v.

BNSF RAILWAY COMPANY

Defendant.

Docket No. 42132

MAR 12 2012

Part of  
Public Record

BNSF RAILWAY COMPANY'S OPPOSITION TO  
CANEXUS'S MOTION TO STRIKE

I. Introduction

The STB should deny the Motion to Strike certain materials in BNSF Railway Company's ("BNSF") opening evidence that was filed by Canexus Chemicals Canada, L.P. ("Canexus") on February 21, 2012. Canexus relies on the Board's February 8, 2012 preliminary decision on BNSF's Motion to Permit Consideration of 2011 TIH Movements from BNSF's Traffic Data in Selecting Comparison Group (hereafter "BNSF's Motion") as the basis for asking the Board to strike *all* references to BNSF's 2011 TIH traffic data in BNSF's opening evidence. While Canexus complains principally about BNSF's inclusion of 2011 traffic data in its preferred comparison group, the exhibit to Canexus's Motion to Strike shows that Canexus is also asking the Board to strike all evidence relating to an Other Relevant Factor – the Current Rate Adjustment – that BNSF developed using 2011 TIH traffic data.

The STB should not strike either BNSF's preferred comparison group evidence or its Current Rate Adjustment. As BNSF explained in its opening evidence, striking BNSF's preferred comparison group would be improper given the uncertainty regarding the implications

of the Board's February 8 preliminary decision. Moreover, Canexus is not prejudiced by having BNSF's preferred comparison group in the record. BNSF's submission of its preferred comparison group did not limit in any way the traffic that Canexus was eligible to sponsor in what Canexus believed was the best comparison group for this Three-Benchmark case.

Canexus's request to strike BNSF's Current Rate Adjustment is completely without foundation. Canexus mistakenly claims that the Board's February 8 preliminary decision prohibited the use of 2011 TIH traffic data for *all* purposes. While the scope of that decision is unclear as to the use of 2011 traffic data to select comparison groups, one thing is certain -- the February 8 decision did not address the use of 2011 traffic data in Other Relevant Factor evidence since BNSF's Motion, which the February 8 decision addressed, did not mention Other Relevant Factor evidence. In any event, it would clearly be improper to preclude an Other Relevant Factor that was designed to address regulatory lag given that the Board has expressly stated that parties may address the problem of regulatory lag through the presentation of Other Relevant Factor evidence.

Canexus also vaguely claims that it would be unfair to Canexus to allow BNSF to present any evidence using the 2011 traffic data. But Canexus has had access to all BNSF's 2011 TIH data (through September 2011) since January 12, 2012, so it has had ample time to develop evidence based on that data. Moreover, given the central importance in this case of the fundamental change in BNSF's pricing of chlorine transportation that occurred in March 2011, it would be unfair and prejudicial to BNSF to exclude evidence related to those price changes from the record. Striking BNSF's evidence relating to 2011 TIH traffic data would be inconsistent

with the Board's prior statements that it will consider Other Relevant Factor evidence in resolving claims about regulatory lag.<sup>1</sup>

**II. Canexus's Request to Strike BNSF's Preferred Comparison Group, Which Contains 2011 Chlorine Movements, Is Without Merit**

On December 14, 2011, BNSF filed its motion seeking permission for the parties to consider, among other data, 2011 TIH movements from BNSF traffic data in selecting comparison groups for this Three-Benchmark case. In that motion, BNSF explained that there had been a fundamental change in BNSF's pricing of the transportation for TIH movements marketed by BNSF's Industrial Products group in March 2011. This fundamental change resulted from BNSF's realization that it had been pricing such transportation well below market levels as well as from the sea change in the TIH transportation regulatory environment over the preceding two years and the resulting changes in underlying costs. As a result, the only truly comparable movements to the issue traffic movements were post-March 15, 2011 movements from BNSF's traffic data. The 2006-2009 Waybill Sample data provided to the parties by the Board had *no* comparable movements to the issue traffic movements since they occurred prior to the fundamental change in chlorine pricing.

On February 8, 2012, the STB issued a preliminary decision denying BNSF's Motion without providing any rationale for its decision. The Board stated that it would address the merits of BNSF's Motion in a subsequent decision which has not yet been published. The

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<sup>1</sup> Earlier today, the Board issued a decision in *Waybill Data Released in Three-Benchmark Rail Rate Proceedings*, STB Ex Parte No. 646 (Sub-No. 3) (served March 12, 2012). That decision did not address the question whether BNSF should be entitled to use 2011 traffic data for purposes of presenting evidence in the present case on comparison groups or Other Relevant Factors. However, the Board's decision reiterated conclusions that the Board had previously made, *i.e.* that a railroad's internal traffic data may be used in some circumstances for selecting a comparison group (at 5, n. 12) and that confidential data may be used to present Other Relevant Factor evidence (at 8 and n. 19).

preliminary decision ambiguously described BNSF's Motion as seeking "permission to add *only* BNSF's 2011 traffic tape data (through the third quarter) to the available data for the parties to introduce comparison group evidence regarding toxic-by-inhalation movements." STB February 8, 2012 Decision at 1 (emphasis added). As explained in BNSF's opening evidence at 4-5, it is unclear to BNSF whether the STB's reference to BNSF's request "to add *only* 2011 traffic data" meant that the STB mistakenly thought that BNSF was seeking to limit the data used to present a comparison group to 2011 traffic data. In fact, BNSF sought no such limitation. Rather, BNSF's objective was to expand the data eligible to be used for selecting a comparison group to include 2011 BNSF traffic data as well as the Waybill Sample data provided by the STB.

Given the uncertainty regarding the implications of the February 8, 2012 preliminary decision as well as the imminent February 13 deadline for filing opening evidence, BNSF submitted two alternative comparison group scenarios: a "preferred" comparison group containing movements from 2011 BNSF traffic data and an "alternative" comparison group consisting of movements from 2009 Waybill Sample data.

Canexus argues that BNSF's 2011 TIH traffic data should be struck from BNSF's opening evidence under 49 C.F.R. § 1104.8, incorrectly claiming that it is "irrelevant, immaterial, as well as inadmissible in this case." *Motion to Strike* at 3. For the reasons set forth in BNSF's Motion, the post-March 15, 2011 TIH movements included in BNSF's preferred comparison group are clearly relevant and material. As to admissibility, BNSF explained that the STB's February 8 decision was ambiguous and appeared to be based on a misunderstanding of BNSF's request to allow the use of 2011 traffic data in presenting a comparable traffic group.<sup>2</sup>

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<sup>2</sup> Canexus incorrectly claims that BNSF's "alleged confusion" regarding the February 8 preliminary decision is contrived so as "to try and force BNSF's 2011 traffic data into the evidentiary record." *Motion to Strike* at 3. But BNSF submitted the 2011 traffic data from

Whether the Board will allow BNSF to present its preferred comparison group is an issue that BNSF expects will be decided when the Board issues its merits decision on BNSF's Motion.

**III. Canexus's Request to Strike BNSF's Current Rate Adjustment, an Other Relevant Factor Calculated Using 2011 BNSF Traffic Data, is Completely Unfounded**

While Canexus's motion to strike does not refer once to BNSF's Other Relevant Factor evidence, it is clear from a review of Exhibit 1 to Canexus's motion that Canexus's general request to strike *all* references to BNSF 2011 traffic data from BNSF's opening evidence encompasses a request to strike an Other Relevant Factor presented by BNSF – the Current Rate Adjustment – that applies to BNSF's alternative comparison group. BNSF's Current Rate Adjustment is developed using BNSF's 2011 TIH traffic data.

Canexus's request to strike this evidence is based primarily on Canexus's claim that the Board's February 8 preliminary decision prohibited the use of 2011 traffic data for *any* purpose in this case. But Canexus's interpretation of the February 8 decision is clearly wrong. The BNSF motion that was the subject of the STB's preliminary decision was limited to seeking permission to consider, among other data, 2011 TIH movements from BNSF's traffic data *in selecting comparison groups*. BNSF filed this motion because under normal circumstances, the comparison group movements would be drawn from the Waybill Sample provided by the STB to the parties. *See Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1) (served Sept. 5, 2007) (hereafter "*Simplified Standards*") at 18, 83.

While BNSF's Motion focused only on the use of 2011 traffic data in a comparison group, Canexus incorrectly asserts that the February 8 decision addressed to BNSF's Motion "inform[ed] the parties that the BNSF 2011 TIH traffic data that was the subject of the Motion

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which it drew the comparable movements as an attachment to its motion submitted on December 14, 2011 to assist the Board in evaluating the grounds for BNSF's Motion. Consequently, the data were already in the record before BNSF submitted its opening evidence.

could *not* be used by either party in their opening evidentiary submissions.” *Motion to Strike* at 2 (emphasis in original). Similarly, Canexus incorrectly claims that “2011 TIH traffic data at issue was determined by the Board by issuance of its February 8 decision, to be irrelevant, immaterial, as well as inadmissible in this case.” *Motion to Strike* at 3.

Canexus cites no language in the Board’s brief February 8 decision to support these sweeping claims. While the scope and meaning of the February 8 preliminary decision is unclear as it relates to the use of 2011 traffic data in a comparison group for the reasons discussed above, that decision is perfectly clear in the following respect: it did not address the use of 2011 TIH data for developing Other Relevant Factors for the simple reason that the Other Relevant Factor part of a Three-Benchmark case was not even a topic raised in the BNSF motion that was the subject of the February 8 preliminary decision.<sup>3</sup>

More significantly, BNSF’s data on current rates is used appropriately in this case to address the well-recognized problem of regulatory lag arising from the use of outdated waybill data. The STB has acknowledged that relying on the Waybill Sample may introduce some regulatory lag into the Three Benchmark analysis and, as a result, has provided that “parties may present (as ‘other relevant factors’) evidence that the presumed maximum lawful rate should be higher, or lower, due to market changes not reflected in the comparison group or the average RSAM and R/VC<sub>>180</sub> benchmarks.” *Simplified Standards* at 85. During the appeal of the *Simplified Standards* decision, the STB informed the D.C. Circuit of the regulatory lag problem

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<sup>3</sup> Canexus also argues that the continued presence of 2011 TIH traffic data in this case would be “contrary to the Three Benchmark rules” (*Motion to Strike* at 3), but it fails altogether to explain why. Confidential data produced in discovery has previously been used in Three-Benchmark cases to develop Other Relevant Factors. In *US Magnesium, L.L.C. v. Union Pacific Railroad Co.*, STB Docket No. 42114, Union Pacific relied on confidential data to develop a PTC adjustment that it sponsored as an Other Relevant Factor. Complainant, US Magnesium, also relied on confidential data produced by Union Pacific regarding Union Pacific’s supposed TIH pricing strategy to develop an Other Relevant Factor.

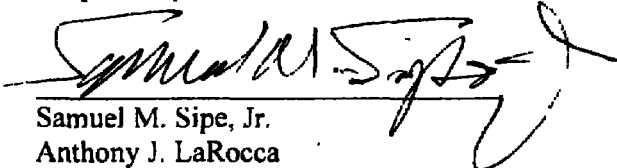
and explained that it had established a mechanism – the opportunity to present evidence of other relevant factors – to address the regulatory lag issue. *CSX Transp., Inc. v. STB*, 568 F.3d 236, 247-248 (D.C. Cir. 2009). Having established the Other Relevant Factor as a mechanism for addressing regulatory lag, it would be inappropriate for the Board to strike a BNSF Other Relevant Factor that is designed to address that precise issue.

Canexus also asserts that the use of 2011 TIH traffic data in this case would be “fundamentally unfair and prejudicial to Canexus” (*Motion to Strike* at 3) but does not explain how the inclusion of BNSF’s Other Relevant Factor developed using 2011 TIH traffic data could be fundamentally unfair and prejudicial to Canexus. Given that BNSF produced its 2011 TIH traffic data (through September 2011) to Canexus on January 12, 2011, Canexus is not prejudiced by BNSF’s use of the data to develop an Other Relevant Factor. On the other hand, if the STB were to strike an Other Relevant Factor proposed by BNSF to address regulatory lag without even reviewing it on the merits as Canexus requests, this would be fundamentally unfair and prejudicial to BNSF.

#### IV. Conclusion

For the reasons set out above, the Board should deny Canexus’s motion to strike.

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March 12, 2012

ATTORNEYS FOR BNSF RAILWAY CO.

**Certificate of Service**

I hereby certify that on this 12th day of March, 2012, I caused to be served a copy of the BNSF's Opposition to Canexus's Motion to Strike on the following by e-mail in pdf format:

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